Mohd Zain b Abdul Hamid & Anor v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO K-05–104 OF 2011
KN SEGARA, SULAIMAN DAUD AND AZHAR MA'AH JJCA
25 MAY 2012

Evidence — Burden of proof — Possession of drugs — Trial judge ruled prima facie case established based on evidence of actual trafficking — Whether judge's simultaneous invocation of presumption of trafficking under s 37(da) of the Dangerous Drugs Act 1952 cast additional burden on accused to rebut presumption — Whether accused prejudiced by judge's approach — Whether evidence overwhelming that accused were in actual possession of drugs

The appellants were convicted and sentenced to death for jointly trafficking in 9,407g cannabis in a car pursuant to s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). The prosecution's case was that a police officer, SP4, posing as a drug trafficker put out word that he was interested in buying a large quantity of ganja. This eventually resulted in the appellants contacting him to say they could deliver him the drugs if the quantity required and price were finalised. After those matters had been agreed upon, the appellants came in car to meet SP4 to complete the transaction but they were arrested by a police party lying in ambush. The drugs were recovered from the boot of the car. The trial judge called on the appellants to make their defence holding the prosecution had proved actual possession or mens rea possession of the drugs. He also held that because the amount of the drugs involved exceeded the minimum statutory figure the presumption of trafficking under s 37(da) of the DDA was applicable. The sole issue raised by the appellants in their appeal to the Court of Appeal against conviction and sentence was that the trial judge had misdirected himself when he not only relied on evidence of actual trafficking but also on the presumption of trafficking under s 37(da) and the act of 'transporting' under s 2 of the DDA to find that a prima facie case of trafficking had been made out against the appellants. The appellants complained that the judge's approach cast an additional burden on them to rebut the presumption of trafficking saying the prosecution had, in its opening address, said it would prove its case on evidence of direct trafficking and not on presumption of trafficking under s 37(da).

Held, dismissing the appeal and affirming the conviction and sentence:

(1) There was no merit in the appellants' contention that the defence had been prejudiced by the approach taken by the trial judge in coming to his finding. With such overwhelming evidence that was before him there was no flaw in the trial judge's finding (see para 13).

(2) The factual matrix of the case clearly showed evidence of prior negotiation and transaction between SP4 and the appellants with regard to the purchase and supply of the drugs in a large amount and that the appellants were in actual possession of the drugs in question (see para 12).

[Bahasa Malaysia summary

Perayu-perayu disabitkan dan dihukum mati kerana mengedar dadah kanabis seberat 9,407g secara bersama di dalam kereta menunut s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Kes pendakwaan adalah bahawa pegawai polis, SP4, berpura-pura sebagai pengedar dadah menyebarkan yang dia berminat dalam membeli kuantiti dadah yang besar. Ini akhirnya menyebabkan perayu-perayu menghubungi dia dengan menyatakan yang mereka boleh menghantar dadah tersebut jika kuantiti yang diperlukan dan harga ditetapkan. Selepas perkara-perkara tersebut dipersetujui, perayu-perayu datang dengan kereta untuk berjumpa dengan SP4 untuk menyelesaikan transaksi tetapi mereka ditangkap oleh sepasukan polis yang sedang menunggu untuk menyerang hendap. Dadah tersebut diperolehi daripada but kereta. Hakim perbicaraan memanggil perayu-perayu untuk memasukkan pembelaan mereka dengan memutuskan pendakwaan telah membuktikan milikan sebenar atau milikan mens rea dadah tersebut. Beliau juga memutuskan bahawa oleh kerana jumlah dadah yang terlibat melebihi jumlah statutori minima anggapan pengedaran di bawah s 37(da) ADB digunapakai. Satu-satunya isu yang dibangkitkan oleh perayu-perayu dalam rayuan mereka ke Mahkamah Rayuan terhadap sabitan dan hukuman adalah bahawa hakim perbicaraan telah tersalah arah apabila beliau bukan sahaja bergantung atas keterangan pengedaran sebenar tetapi juga atas anggapan pengedaran di bawah s 37(da) dan tindakan 'transporting' di bawah s 2 ADB adalah untuk mendapatkan bahawa kes prima facie pengedaran telah dibuat terhadap perayu-perayu. Perayu-perayu mengadu bahawa pendekatan hakim meletakkan beban tambahan ke atas mereka untuk mematahkan anggapan pengedaran dengan menyatakan pendakwaan telah, di dalam pembukaan kesnya, menyatakan yang ia akan membuktikan kesnya atas keterangan pengedaran terus dan bukan atas anggapan pengedaran di bawah s 37(da).

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Tidak terdapat merit di dalam hujahan perayu-perayu bahawa pembelaan telah diprejudiskan melalui pendekatan yang diambil oleh hakim perbicaraan dalam mencapai keputusannya. Dengan keterangan yang kukuh di hadapannya tidak terdapat kecacatan dalam keputusan hakim perbicaraan (lihat perenggan 13).

(2) Fakta matriks kes jelas menunjukkan keterangan perundingan terdahulu dan transaksi di antara SP4 dan perayu-perayu berkaitan kepada pembelian dan pembekalan dadah dalam jumlah yang besar dan bahawa perayu-perayu mempunyai milikan sebenar terhadap dadah yang dipersoalkan (lihat perenggan 12).]

Notes

For a case on possession of drugs, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) para 666.

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 37(da), 39B(1)(a), (2)
Penal Code s 34

Appeal from: Criminal Trial No 45–06 of 2009 (High Court, Alor Setar)

Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the appellants.
Dian Isda (Farah Ezlin with her) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Azhar Ma'ah JCA (delivering judgment of the court):

[1] In this case both the appellant were jointly charged in Alor Setar High Court on the following charge.

> Bahawa kamu bersama-sama pada 17.11.2007, jam lebih kurang 7.00 malam, di dalam sebuah kereta No. PFW 8943, jenis Proton Iswara Aeroback, warna merah di halaman rumah No. 14, Kampung Padang Penyengga, Junjong, dalam Daerah Kulim, dalam Negeri Kedah Darul Aman telah didapati memperedarkan dadah berbahaya iaitu cannabis seberat 9,407 gram. Oleh yang demikian, kamu telah melakukan kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 (ADB) boleh dihukum di bawah seksyen 39B(2) Akta yang sama dan dibaca bersama seksyen 34 Kanun Keseksaan.

[2] The High Court judge at the conclusion of the trial found both the appellant guilty as per charge and upon conviction sentenced them to death. Hence, this appeal.

[3] The facts of the prosecution case as stated by the learned trial judge in his grounds of judgment are as follows:

> Prosecution's Case
>
> On the instruction of ASP Wan Zulkifli on 19 September 2007 at about 3.50pm, D/L/Kpl Zulkifli bin Mustapa, SP4 went to a waterfall area at Sedim where SP4 met a person known as Keun. SP4 introduced himself as drug trafficker operating in Taiping area. If SP4 wanted ganja in big amount, Keun could get it from his employer called Abang Zain. At the end of this meeting, SP4 give his handphone number to Keun for future contact.

On 3 October 2007, SP4 received a call from a man who identified himself as Abang Zain. He enquired whether SP4 was interested to purchase ganja. When the answer was positive, Abang Zain enquired the whereabout of SP4's house. SP4 told him he lived alone in a rented house in Kulim. Abang Zain informed SP4 that he was coming to the latter's house.

On 5 October 2007 at about 3pm, SP4 had rented a kampong house at Kampung Padang Penyengga, Junjong, Kulim.

On 13 October 2007 at about 12 noon, SP4 had received a call from Abang Zain. Abang Zain told him he wanted to come to SP4's house that night. At about 8pm, Abang Zain came to SP4's house in a motorcar bearing registration number PFW 8943. Together with him was a male Malay called Zack.

Abang Zain was indentified as OKT1, whilst Zack as OKT2. OKT1 and OKT2 were brothers.

Inside SP4's house, they were chit-chatting. OKT2 had admitted that he had involved in trafficking drugs for more than ten years. OKT2 confessed that he was once arrested and detained at Pusat Pemulihan Akhlak at Simpang Renggam. SP4 informed OKT1 that his involvement in drugs activities for the last two years. OKT1 enquired from SP4 the amount of ganja the required. SP4 replied that normally he required 10 kilos per booking. Abang Zain said he would determine he suitable time for delivery. In the conversation, OKT1 confirmed that the price of ganja was RM2,000 per kilo. The price was payable upon delivery. OKT1 and OKT2 left SP4's house at about 9.40pm the same night.

On 15 November 2007 at about 3.30pm, while SP4 was in Pekan Junjong, he received a call from OKT2. OKT2 told him he was then in front of SP4's house. SP4 returned home. He met OKT2 in front of his house. On being asked the purpose of his visit, OKT2 replied that he came to tell SP4 that the price of ganja was RM2,000 per kilo and also to find out when the drugs were required. OKT2 promised to bring the ganja in two days, that is, on 17 November 2007. But the time was not agreed upon.

On 17 November 2007 at about 3.30pm, SP4 had received SMS from OKT1 that he would arrive at SP4's house at about 7pm.

SP4 conveyed the message to ASP Wan Zulkifli, SP6 and he also went to SP6's office at about 5.15pm. Other detectives were also there. A briefing was conducted by SP6 to plan to arrest OKT1. SP4 was supplied with 'wang tunjuk' in the sum of RM5,000 by SP6. SP6 had divided the raiding party into three groups, namely:

(a) Group 1 was led by SP6 and consisting of D/L/Kpl Johan, D/L/Kpl Azahar and D/L/Kpl Shamsudin;

(b) Group 2 was led by Insp Ag Rablin and consisting of D/L/Kpl Mulok, D/Kpl Fauzi, DSM Mohd Sharif and D/L/Kpl Faizah; and

(c) Group 3 was led by D/Sjn Saad and D/Kpl Zulkarnain. This group was asked to make observation.

At about 6.45pm (17 November 2007), SP4 was in Pekan Junjong when he received a phone call from OKT1. OKT1 informed him that he was at the main road junction leading to SP4's house. SP4 asked OKT1 to wait for him there. Upon SP4's

arrival, he noticed a red Proton Iswara motorcar bearing registration number PFW 8943 with OKT1 sat at the driver's seat, whilst OKT2 was seated in the front seat next to OKT1. SP4 gestured OKT1 to follow him. SP4 was riding a motorcycle. OKT1 followed and stopped the motorcar beside a house as shown in photograph P19B.

On SP4's request, OKT1 and OKT2 entered SP4's house. Inside the house, OKT1 told SP4 that the drugs was already in the Proton Iswara. OKT1 wanted the money to be paid. But SP4 wanted to see the ganja. OKT1 and OKT2 invited him to go to the motorcar. At the request of OKT1 the boot of the said motorcar was opened. It was opened by OKT2 using the car keys. In the boot, SP4 noticed a grey-coloured plastic package. In it there was a black plastic package. OKT2 opened the black plastic package, then SP4 saw there were several slabs wrapped in translucent plastic believed to contain ganja. OKT2 informed SP4 that he brought ganja more than requested.

When the boot was opened, OKT1 went to take up the driver's seat. Having seen the ganja, the boot was closed again. OKT2 went to take up the front seat, next to OKT1. OKT2 told OKT1 that SP4 wanted to take all the ganja. SP4 was standing beside OKT2's door when he scratched his head, an agreed signal to strike. On seeing the signal, the members of the raiding team rushed towards the motorcar. SP4 ran away into the oil palm estate, at the rear of his rented house. SP6 and his men ran toward OKT1 who was seated at the driver's seat and detained him. Whilst OKT2 who was seated in the front seat was detained by Group 2 personnel. Their bodies were searched and nothing incriminating was found.

OKT1 and OKT2 were taken to the boot of the motorcar. The boot was opened and a grey plastic package was seen. The grey plastic package was seized. In it there were two layers of a black plastic bag containing ten compressed slabs wrapped in transparent plastic which were believed to contain ganja.

SP6 also seized a black traveling 'Diadora' bag from above the right speaker at the rear of the motorcar. Several documents in the name of OKT1 were also recovered on top of the 'Diordora' bag.

[4] The chemist Siti Nur Azirawati bt Idris ('SP3') upon analysis confirmed that the drugs were cannabis weighing a total of 9,407g.

[5] Based on the facts aforementioned, the learned trial judge ordered the two appellants to enter upon their defence, apparently on the following grounds:

(a) there is evidence of common intention under s 34 of the Penal Code (p 99 RR); and

(b) he was satisfied that the prosecution has proved actual possession or mens rea possession of the prescribed drugs against the appellants. As the drugs are in excess of the minimum statutory amount, the presumption of trafficking under s 37(da) of the Act is applicable (p 104 RR).

THE CASE FOR THE DEFENCE

[6] The learned trial judge in his grounds of judgment before us summarised the appellants' defence as follows:

> On 17 November 2007 at about 5.30pm, together with his brother OKT1, they went for a drink at a nearby stall after finished work at *Kilang Beras* at Perai. About 20–30 minutes later, after finished drinking, they went to fetch the motorcycle WMJ 2412. In the meantime, OKT2 received a call from one Keun. Keun requested them to go to Kampung Padang Penyengga, Junjong, Kulim, as he wanted to return the motorcar PFW 8943 which he had borrowed for the past two days. The red Proton Iswara Aeroback PFW 8943 was rented by OKT1 for Keun's use to attend wedding.
>
> Upon arrival at Kampung Padang Penyengga, OKT1 saw Keun together with an unknown person waited near the motorcar PFW 8943. There were several houses there. OKT1 stopped his motorcycle. OKT1 and OKT2 got down from the motorcycle and walked up to Keun who was about 20–30 meters away. As they were walking, Keun invited OKT1 and OKT2 to go into the motorcar to discuss certain things. Before discussion could start, Keun informed them that he had left something in his friend's house. Keun requested OKT2 to come along with him. At the same time, Keun requested OKT1 to wait under the tree in front of the house. The unknown person was nearby the house.
>
> While OKT2 was with Keun, a group of persons rushed towards OKT1 and OKT2. They were duly arrested. Keun and the unknown person ran away.
>
> OKT1 and OKT2 were taken to Balai Polis Kulim.
>
> OKT1 denied having dealt with the sale of ganja to SP4. SP4 was never present at the scene of crime. Neither OKT1 knew SP4 before. OKT1 also had never seen the ganja which was tendered as exhibits in this case.

[7] The learned trial judge in evaluating the defence of the appellants had these to say:

> The defence story that OKT1 and OKT2 went to Kampung Padang Penyengga on motorcycle WMJ 2412 at the request of Keun with a view return the borrowed motorcar PFW 8943; there they saw Keun with an unknown person near the said motorcar; Keun invited them to get onto the motorcar to discuss something; before he could begin, Keun requested OKT2 to accompany him to his friend's house as something was there and thereafter a group of persons ran towards OKT1 and OKT2 and arrested them were difficult to believe. Their story was afigment of OKT1 and OKT2 's imagination. The defence version was never laid out to the prosecution witnesses, especially the agent provocateur, SP4 during the prosecution case. The failure to put the defence case at the very first reasonable opportunity had thrown doubt to the defence case as being a recent invention or an afterthought.

THE APPEAL

[8] Before us only one issue was raised by counsel for the appellants ie 'that the learned trial judge misdirected himself when His Lordship, apart from relying on the evidence of actual trafficking, also invoked the 'presumed trafficking' presumption under s 37(da) of the Act and the act of 'transporting' under s 2 of the Act to find that there was a prima facie case of trafficking'.

[9] Referring to the opening address by learned deputy public prosecutor it is submitted that the prosecution did not at any point of time intimate their intention to rely on 'presumed trafficking' under s 37(da) to prove its case instead it relied on the evidence of direct trafficking. In this regard, learned counsel for the appellants drew our attention to the following passage in the learned trial judge's grounds of judgment which reads:

> Further or in the alternative, I was satisfied that the prosecution has proved actual possession or mens rea possession of the prescribed drugs against OKT1 and OKT2. As the drugs are in excess of the minimum statutory amount, the presumption of trafficking under s 37(da) of the Act is applicable.

[10] The appellants complaint is that such approach taken by the learned trial judge in coming to a finding of trafficking by the appellants has cast additional burden on them in rebutting such presumption.

[11] In dealing with this kind of argument, we are mindful of the fact that s 2 of the DDA 1952 spells out a series of acts in dealing with drugs that can be categorised as an act of trafficking of drugs. They include, inter alia, buying, selling, transporting, carrying, sending, delivering, procuring, supplying, etc.

[12] Going by the factual matrix of the case in the present appeal it is clear that there is evidence of prior negotiation and transaction between SP4 and both the appellant with regard to the purchase and supply of the drugs in a large amount ie more than 10kg. Evidence also revealed that both the appellant were in actual possession of the drugs in question.

[13] With such overwhelming evidence that was placed before the trial judge at the trial, we see no flaw in the trial judge's finding. It follows that we find no merit in the appellants' counsel's contention that the defence has been prejudiced by the approach taken by the judge in coming to his finding.

[14] In the circumstances, we dismissed the appeal and affirmed the order of the trial judge.

Appeal dismissed and conviction and sentence affirmed.

Reported by Ashok Kumar